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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~408.~~ 12

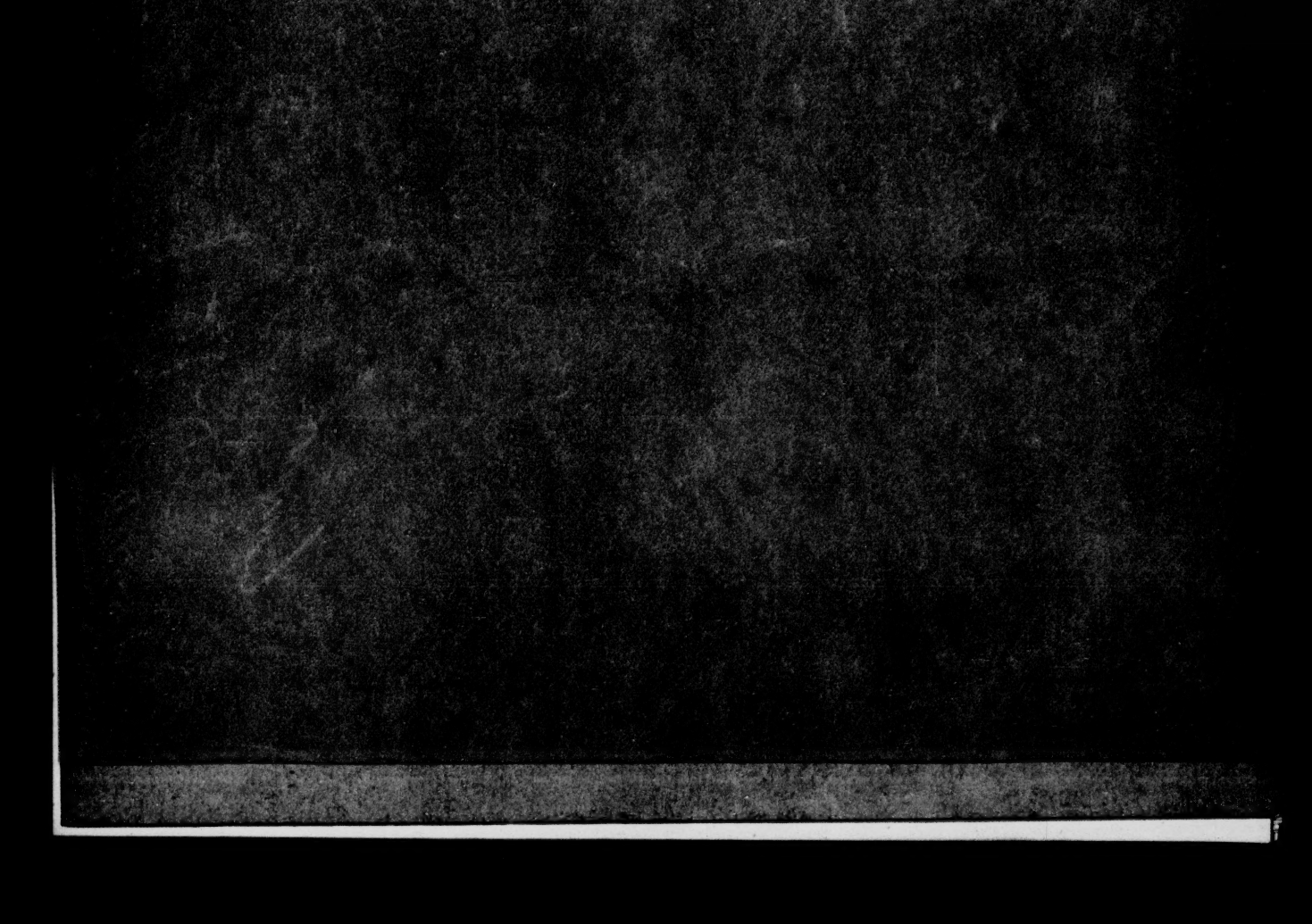
NATHAN B. HILL, AS ADMINISTRATOR OF SAMUEL HILL, DECEASED, PLAINTIFF IN ERROR,

vs.

CYRUS P. MENDENHALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED ~~DECEMBER~~ February 17, 1873.



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Writ of error.

1 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of North Carolina, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Nathan B. Hill, administrator of Samuel Hill, deceased, plaintiff, and Cyrus P. Mendenhall, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court, this 10th day of December, in the year of our Lord one thousand eight hundred and seventy-two.

2 Allowed by—

G. W. BROOKS,
District Judge.

The record and proceedings of the plaint, whereof mention is made in the foregoing writ, are in the words and figures following, that is to say: that on the 7th day of June, 1870, Nathan B. Hill, as administrator of Samuel Hill, deceased, sued out of the office of the circuit court of the United States for the district of North Carolina a writ in these words, to wit:

Summons.

Circuit court, 4th circuit.

UNITED STATES OF AMERICA,
District of North Carolina:

The President of the United States of America to the marshal of the North Carolina district, greeting:

You are hereby commanded to summon Cyrus P. Mendenhall, a citizen and resident of the county of Guilford, North Carolina, (if to be found in your district,) so that he be and appear before the judges of the circuit court of the United States at the next court to be held for the district aforesaid at Raleigh, on the last Monday in November next, then and there to answer unto Nathan B. Hill as administrator of the estate of Samuel Hill, deceased, a citizen and resident of the State of Minnesota, of a plea that he render to him the sum of twenty-seven thousand two hundred and seventy-one dollars and fifty-seven

3 cents, ($27,271.57,) which to him he owes, and from him unjustly detains, to his damage, eight thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the [L. S.] first Monday in June, 1870, and in the ninety-fourth year of the Independence of the United States.

Issued the 7th day of June, 1870. Delivered to the marshal Sept. 14th, 1870.

N. J. RIDDICK,
Clerk.

Having first given the following bond for the faithful prosecution of the suit, to wit:

Bond for p'osecution of suit.

We, and each of us, promise to pay to the defendant named in the within writ the sum of three hundred dol ars, to be void, nevertheless, upon the condition that we pay to the said defendant all costs and damages which may be adjudged to him by reason of failure to prosecute the within suit successfully.

Given under our hands and seals this seventh day of June, 1870.

E. E. MENDENHALL. [SEAL.]
JAMES W. DICK. [SEAL.]

Witness:
W. A. GRAHAM.

4 *Return of summons.*

And on the return day of the said writ, to wit, on the last Monday in November, A. D. 1870, before the said circuit court of the United States for the district aforesaid, the marshal of said district, at Raleigh aforesaid, makes return that he had "executed" the said writ "by delivering a copy to the defendant, Cyrus P. Mendenhall," signing said return "S. T. Carrow, U. S. M."

And thereupon the said Nathan B. Hill by his attorney comes and complains as follows, to wit:

Declaration.

Circuit court of the United States, district of North Carolina.

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, dec'd, *against* CYRUS P. MENDENHALL. } Declaration.

Nathan B. Hill, a citizen of the county of Hennepin and State of Minnesota, as administrator of the estate of Samuel Hill, deceased, the plaintiff in this suit, complains of Cyrus P. Mendenhall, a citizen of Guilford County and State of North Carolina, the defendant in this suit, who has been duly summoned by the marshal to answer the plaintiff, of a plea, that he render to the plaintiff, as administrator of the estate of Samuel Hill, deceased, the sum of twenty-seven thousand two hundred and seventy-one dollars and fifty-seven cents, ($27,271.57,) lawful money of the United States, which he unjustly detains from him.

5 For that whereas the said plaintiff, as administrator as aforesaid, heretofore, to wit, at a district court of the fourth judicial district of the State of Minnesota, held at the court-house in Minneopolis, in the county of Hennepin, in said State, on the twelfth day of March, 1870, by adjournment and agreement of the parties, in a certain action therein pending, wherein the said plaintiff, Nathan B. Hill, as administrator of Samuel Hill, deceased, was plaintiff, and the defendant, Cyrus P. Mendenhall, was defendant, by the consideration and judgment of said court the said plaintiff recovered against the said defendant the said sum of twenty-seven thousand two hundred and seventy-one dollars and fifty-seven cents, (27,271.57,) above demanded, which, in and by the said court, were then and there adjudged to the plaintiff as administrator as aforesaid, for the debt or damages alleged in and costs of said action, whereof the said defendant was convicted, as by the record and proceedings thereof remaining in said court more fully appears, which said judgment still remains in full force and effect, not reversed, satisfied, or otherwise vacated; and the said plaintiff hath not obtained any execution or satisfaction of or upon the said judgment so recovered as aforesaid, whereby an action hath accrued to the plaintiff, as administrator as aforesaid, to demand and have of and from the said defendant the said sum of twenty-seven thousand two hundred and seventy-one dollars and fifty-seven cents, ($27,271.57.)

Yet the said defendant, although often requested so to do, hath not as yet paid the said sum above demanded, or any part thereof, to the said plaintiff. But he to do this hitherto hath wholly refused, and still doth refuse, to the damage of the plaintiff of five thousand dollars, and therefore he brings his suit, &c.

W. A. GRAHAM,
Atto. for Plaintiff.

6 And the said Cyrus P. Mendenhall, the defendant, by his attorneys, S. F. Phillips and A. S. Merrimon, comes and pleads follows, to wit:

Plea—nul tiel record.

In the circuit court of the United States for the district of North Carolina.—November term, A. D. 1870.

CYRUS P. MENDENHALL, defendant,
ats.
NATHAN B. HILL, admin'r, &c., plaintiff.

And the said defendant, by Phillips & Merrimon, his attorneys, comes and defends the wrong and injury, &c., and says, there is not any record of the said supposed recovery in the said district court of the fourth judicial district of the State of Minnesota, held in the court-house in Minneapolis, in the county of Hennepin in said State of Minnesota, in manner and form as the said plaintiff hath in his declaration alleged, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, &c.

Whereupon the said Nathan B. Hill, as administrator of the estate of Samuel Hill, dec'd, by his said attorney, W. A. Graham, replies to the said plea of the said defendant as follows, to wit:

Replication.

In the circuit court of the United States, district of North Carolina, November term, 1870.

7 NATHAN B. HILL, AS ADMINISTRATOR OF Samuel Hill, dec'd, pl'ff, *ag'st* CYRUS P. MENDENHALL, def'd't. } Replication.

And the said plaintiff as to the said plea of the said defendant above pleaded says, that he the said plaintiff, by reason of anything in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the said defendant, because he says that there is such a record of the said recovery in the said district court of the fourth judicial district of the State of Minnesota as the said plaintiff hath above in his said declaration in that behalf alleged; and this the said plaintiff is ready to verify by the said record when, where, and in such manner as the court here shall direct and award, and he prays that the said record may be seen and inspected by the court here.

W. A. GRAHAM,
Plaintiff's Attorney.

And the said cause is continued until June term, 1871. When comes the plaintiff by his attorney, W. A. Graham, and the defendant by his attorneys, S. A. Phillips and A. S. Merrimon. And the cause coming on to be tried, and being argued by the attorneys on both sides and being fully understood, it is adjudged as follows, that is to say:

Judgment.

In the circuit court of the United States in and for the district of North Carolina. Of June term, A. D. 1871.

8 NATHAN B. HILL, ADMINISTRATOR OF Samuel Hill, dec'd, *vs.* CYRUS T. MENDENHALL.

At which term of the said court come the parties aforesaid, by their respective attorneys aforesaid, and the said Nathan B. Hill, administrator of Samuel Hill, deceased, hath not here in court the said record by him about in his said declaration alleged, nor doth he produce the same, but therein wholly fails and makes default; thereupon it is considered by the court that the said Nathan B. Hill, administrator of Samuel Hill, deceased, take nothing by his said writ, and that the said Cyrus P. Mendenhall do go thereof without day.

And it is further considered by the court that the said Cyrus P. Mendenhall do recover against the said Nathan B. Hill, and E. E. Mendenhall and Jas. W. Dick, his sureties for the prosecution of his suit in this behalf, fifty-seven $\frac{60}{100}$ dollars, for his costs and charges by him about his defense in this behalf laid out and expended.

Let execution issue therefor if need be.

Whereupon at the said term of the said United circuit court, to wit, at June term, 1871, before the honorable the judges of said court, the plaintiff, the said Nathan B. Hill, administrator, &c., being dissatisfied with the foregoing judgment rendered by the court at this term, filed his bill of exceptions as follows, that is to say:

Bill of exceptions.

In the circuit court of the United States, district of North Carolina.
June term, 1871.

NATHAN B. HILL, ADMINISTRATOR OF SAMUEL Hill, deceased,
vs.
CYRUS P. MENDENHALL.

This was an action of debt, upon an alleged judgment rendered in the superior court of the county of Hennipin in the State of Minnesota, in favor of the plaintiff against the defendant for the sum of .

The defendant pleaded that there was no such record of judgment as that alleged by the plaintiff.

The plaintiff produced an exemplification of a record of an action by the plaintiff against the defendant in the aforesaid court in the State of Minnesota, a copy of which is appended as a part of this bill of exceptions, marked A.

He also called as a witness one E. E. Mendenhall, who testified that R. J. Mendenhall, who upon oath verified the answer contained in the said alleged record, was the brother of the defendant, and had been before the date of the said verification his agent for the transaction of his business in the State of Minnesota, where the defendant owned both real and personal estate, and that the said R. J. Mendenhall was a resident of the State of Minnesota at and before the date aforesaid.

The defendant, Cyrus P. Mendenhall, was then called by his
10 counsel as a witness, and testified that the said R. J. Mendenhall was not his agent for the defence of the action in question, and that he had had no information of the instituting of the said action until a short time before the bringing of this action in this court.

On cross-examination he stated that the said R. J. Mendenhall had been his agent in Minnesota to attend to his business there, where he had owned bank-stock to the amount of ten thousand dollars, but that this agency had ceased before the date of the commencement of said action. He further stated that he had had interviews in North Carolina, in the latter part of December, 1868, with the said R. J. Mendenhall, who was then on a visit to this State, but they had no conversation in reference to the suit in Minnesota.

And the said testimony having been heard, and the said exemplification of the record being seen and understood by the court here, the court doth adjudge that there is a record of a judgment in the superior court of the county of Hennepin, in the State of Minnesota, in favor of the plaintiff against the defendant for the sum of , as is alleged in the plaintiff's declaration; but it not appearing in said exemplification, or from the evidence, that there had been service of the summons in said action upon the defendant:

It is considered and adjudged by the court here that the said judgment is without effect save within the limits of the State of Minnesota; and that the defendant recover of the plaintiff his costs in this action.

To which judgment of the court here the plaintiff excepted.

11 And he prayed a writ of error to the Supreme court of the United States, which is allowed.

HUGH L. BOND,
C't Judge.

A.

TRANSCRIPT OF RECORD.—DIST. COURT, MINN.

Summons.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased, *ag't* CYRUS P. MENDENHALL. } Summons.

The State of Minnesota to the above-named defendant:

You are hereby summon' and required to answer the complaint of the plaintiff in the above-entitled action, which is filed in the office of the clerk of said court, at the court-house in Minneapolis, in said county, and to serve a copy of your answer to the said complaint on the subscribers at their office in Minneapolis, in the county of Hennipin, in said State, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this
12 action will take judgment against you for the sum of twenty-four thousand six hundred and twenty-six dollars and five cents, and interest from the commencement of this action, together with the costs and disbursements of this action.

CORNELL & BRADLEY,
Plaintiff's Attorneys, Minneapolis, Minn.

Dated September, A. D. 1868.

Return of summons.

STATE OF MINNESOTA,
Hennepin County, ss:

I hereby certify and return, that Cyrus P. Mendenhall, the within-named defendant, cannot be found within this county.

September 21st, 1868.

H. G. HICKS,
Sheriff Hennepin County, Minnesota.

Summons. Filed September 21st, 1868.

D. W. ALBAUGH,
Clerk.

Complaint.

District court, fourth district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased, plaintiff, *vs.* CYRUS P. MENDENDALL, DEFENDANT. } Complaint.

13 The above-named plaintiff complains and alleges that the said

Samuel Hill died intestate on the 18th day of January, A. D. 1859, at Carthage, Indiana, where he was temporarily on a visit; that he was then residing in the county of Randolph and State of North Carolina, of which last-named place he was then a resident and inhabitant. That at the May term of the court of pleas and quarter sessions held in and for said county of Randolph and State of North Carolina, in May, A. D. 1859, letters of administration upon the estate of the said Samuel Hill, deceased, was duly issued by said court to the plaintiff, by which he was duly appointed administrator of all and singular the goods and chattels, rights and credits, belonging to the said Samuel Hill at the time of his death. That by the laws of the said State of North Carolina, said court was then vested with full power and jurisdiction to issue such letters of administration and to appoint such administrator, and the order of the said court issuing said letters and making said appointment was duly made. That an authenticated copy of said appointment of plaintiff as such administrator has, prior to the commencement of this action, been filed in the probate court of said county of Hennipin and State of Minnesota.

That on the 5th day of August, A. D. 1861, the plaintiff, as such administrator aforesaid, placed in the hands and charge of the defendant, as his agent and attorney in that behalf, for the purpose of collection, and to be by him accounted for by collection or otherwise, divers claims, demands, notes, and judgments against divers persons, belonging to said estate and to the said plaintiff as administrator as aforesaid, whereof the following is a correct statement and schedule, to wit:

14 One certain note against one William Bell for $208.12, due the sixth day of February, 1860, on which there was endorsed $166, February 5th, 1861.

One note against Isaac Lee and Mark Albertson, due January 19th, 1859, for $109.30.

One note against Enoch Farlow and Thomas Jones for $454.60, due February 2nd, A. D. 1856, whereon the following payments had been made, viz: one year's interest, also $120 on the 14th day of July, 1857; $27 on the 5th day of January, 1859, and $213.26 on the 16th day of April, 1860.

One note against John Dunbar and F. Davis for $271.16, due November 25th, 1858, whereon $200 had been paid June 7th, 1860.

One note against G. C. Mendenhall, S. G. Coffin, and C. G. Wheeler for $250, due October the 27th, 1858, on which $15 was paid October 27th, 1859.

One note against Jonathan Worth for $560, due August 4th, 1854, whereon the interest was paid to August 5th, 1860.

One note against H. Stewart, Silas Keeran, and Ivy Keeran for $389.24, due November 16th, 1852, whereon the interest was paid to August 6th, 1856, and also $163.24 June 6th, 1857; $35 on the 20th November, 1858, and $85 on the 6th day of August, 1860.

One note against Benjamin Rush and Noah Rush for $151, due November 26th, 1858.

Three certain judgments duly rendered in the court of pleas and quarter sessions of the county of Randolph and State of North Carolina, on the first Monday of May, A. D. 1860, in favor of the plaintiff as administrator as aforesaid, and against the Union Manufacturing Company, Jesse Walker, James Dicks, and Charles W. Woolen, defendants, viz: one for $4,727, with a credit of $280.62 the 1st January, 1860;

15 one for $4,727 with interest from January 12th, 1859, with a credit of $280.62 the 1st January, 1860, and also one for $4,727 with

interest from January 12th, 1859, with a credit of $280.62 the 1st January, 1860, on which said last three judgments there was due and unpaid $14,181, and interest from January 12th, 1861, less $1,487.81 paid May 9th, 1861, and $172.25 paid May 11th, 1861.

One certain judgment rendered in said court of pleas and quarter sessions in favor of said plaintiff and against Joseph Newlen, Newton Newlen, J. F. Newlen, Aaron S. Newlen, John N. Newlen, and Sarvell Farlow, on the first Monday of May, 1860, in an action of debt for $1,200 and interest from 2nd September, 1858.

One certain other judgment rendered in said court of pleas and quarter sessions in favor of said plaintiff and against Joseph Newlen, Newton Newlen, Jabez F. Newlen, and Aaron S. Newlen, defendants, on the first Monday in November, 1859, in an action of debt for $667.18, with interest from April 25th, 1858.

Also, one certain other judgment rendered in said court of pleas and quarter sessions, in favor of said plaintiff and against Joseph Newlen, Newton Newlen, J. F. Newlen, Aaron S. Newlen, John N. Newlen, and Franklin Gardner, defendants, on the first Monday in May, 1860, in an action of debt for $385.78 and interest from the 22nd November, 1858.

Also, one judgment rendered in said court of pleas and quarter sessions in an action of debt in favor of said plaintiff and against John Farlow and Enoch Farlow, defendants, on the first Monday of May, A. D. 1860, for $150, with interest from 28th February, 1857, on which $77 was paid on the 9th day of May, 1861.

16 That each and every of said notes and judgments were good and collectable, and no part of any of the same, except as hereinbefore stated, had ever been paid when the same were placed in the hands of said defendant. That def't, upon the receipt of the same, promised and undertook to collect the same or account therefor to pl'ff. That, in the fall of 1866, the plaintiff requested and demanded of defendent to account for the said demands by a return thereof, or the proceeds thereof if collected. That defendant then, and ever since, failed and refused, and still does refuse to account therefor to pl'ff by a return of the same or the proceeds thereof; and pl'ff avers that def't has collected said demands, notes, and judgments, and appropriated the same to his own use. That there is now due from the def't by reason of the premises, of principal and interest, the sum of twenty-four thousand six hundred and twenty-six dollars and five cents. For which sum, and interest from the commencement of this action, pl'ff demands judgment with costs.

CORNELL & BRADLEY,
Atto's for Pl'ff.

Verification of complaint.

STATE OF MINNESOTA,
Hennipin County, ss:

Nathan B. Hill, be duly affirmed, deposes and says that he has read the foregoing complaint, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

NATHAN B. HILL.

17 Subscribed and affirmed before me Sept. 21, 1868.

CHA'S H. WOODS,
City Justice of Minneapolis, Hennipen Co., Minnesota.

Complaint. Filed September 21st, 1868.

D. W. ALBAUGH, *Clerk.*

Affidavit of non-residence.

District court, 4th judicial district.

STATE OF MINNESOTA,
Hennipin County, ss:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased, pl'ff, *ag't* CYRUS P. MENDENHALL, DEF'T.

Nathan B. Hill, being duly affirmed, deposes and says that Cyrus P. Mendenhall, the def't herein, lives and resides in the county of Guilford, in the State of North Carolina, and in Greensboro' in said county, and cannot now be found in this State, and that he has property in this State: and further says not.

NATHAN B. HILL.

Subscribed and affirmed to before me Sept. 21st, 1868.
CHARLES H. WOODS,
City Justice of Minneapolis, Hennepin County, Minnesota.

18 *Order of publication.*

District court, 4th judicial district.

STATE OF MINNESOTA,
Hennepin County:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased, plaintiff, *ag't* CYRUS P. MENDENHALL, DEFENDANT.

On reading the foregoing affidavit, and the complaint on file in this action, and the return of the sheriff of Hennipen County to the summons herein, that the defendant cannot be found in said Hennipen County, ordered that service of said summons be made by publication of the same in the Minneapolis Daily Tribune, a newspaper printed and published at Minneapolis, in said county of Hennipin, once in each week for six consecutive weeks.

Dated Sept. 21st, 1868.

CHA'S E. VANDERBURGH, *Judge.*

Affidavit and order for publication filed September 21st, 1868.
D. W. ALBAUGH, *Clerk.*

Summons as published.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennipin:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased, plaintiff, } Summons.
19 *against*
CYRUS P. MENDENHALL, defendant.

The State of Minnesota to the above-named defendants:

You are hereby summoned and required to answer the complaint of

the plaintiff in the above-entitled action, which is filed in the office of the clerk of said court, at the court-house in Minneapolis in said county, and to serve a copy of your answer to the said complaint on the subscribers, at their office in Minneapolis, in the county of Hennipin in said State, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of twenty-four thousand six hundred and twenty-six dollars and five cents, and interest from the commencement of this action, together with the costs and disbursements of this action.

Dated September, A. D. 1868.

CORNELL & BRADLEY,
Plaintiff's Attorneys.

Affidavit of publication.

STATE OF MINNESOTA,
County of Hennipin, ss:

F. S. Smith, being duly sworn, deposes and says: That during all the time hereinafter mentioned he was foreman and printer in the office of the Minneapolis Tribune, a newspaper printed and published at Minneapolis, in said county, and knows of his own personal knowledge that the summons, a printed copy of which is hereunto annexed, was printed and published in said newspaper once a week for six successive weeks, the first publication being made on Tuesday, the 22nd day of September, 1868, and the last publication being made on Tuesday, the 3d day of November, 1868.

F. S. SMITH.

Subscribed and sworn to before me this 13th day of April, 1870.

J. STONE, JR.,
Notary Public, Minnesota.

Publication fees, $6.25.—Paid by plaintiff.

Notice of appearance.

District court, 4th district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, ADMINISTRATOR OF THE ESTATE of Samuel Hill, deceased,
vs.
CYRUS P. MENDENHALL.
} Notice of appearance.

SIR: Please take notice that we are retained and appear as attorneys for the defendant in the above-entitled action.

Dated Dec. 31st, A. D. 1868.

Yours, respectfully,

WILSON & MCNAIR,
Attorneys for Defendant.

To CORNELL & BRADLEY,
Attorneys for Plaintiff.

Notice of substitution of atto's.

District court, 4th judicial district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased,
against
CYRUS P. MENDENHALL.

To Messrs. CORNELL & BRADLEY,
Atto's for Pl'ff, Minneapolis, Minn.:

GENTLEMEN: You will please take notice that Lochren & McNair, of Minneapolis, Minnesota, are substitued as attorneys for defendant in the above-entitled action in the place of Wilson & McNair, the former attorneys.

March 1st, 1870.

WILSON & McNAIR.
Per McNAIR.

LOCHREN & McNAIR.

22 *Answer of Def't.*

District court, fourth district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, ADMINISTRATOR OF SAMUEL Hill,
vs.
CYRUS P. MENDENHALL.

The def't, answering pl'ff's complaint in above-entitled action, says:

That as to whether the said Nathan B. Hill is the administrator of said Samuel Hill, deceased, he has no knowledge or information sufficient to form a belief, and therefore denies the same.

That the said claims mentioned in complaint were placed in his hands for collection as attorney at law, and not otherwise.

That all of said claims were against parties residing in the said State of North Carolina, and that all of said judgments were in the courts of said State.

That on or about the month of , 1861, the said State of North Carolina, by its legislature, passed an ordinance of secession from the Government of the United States of America, and entered into open rebellion against said Government and connected itself with the so-called government of the Confederate States of America.

That before the payment of any of said claims or judgments as hereinafter mentioned, the said Confederate States of America issued bills and notes, called and known by the name of "confederate currency," which said currency, both by the laws of the Confederate State government and of the said State of North Carolina, acting under it,
23 was declared to be a legal tender of all debts in said State, and

that such laws continued in actual force until after all of said pretended judgments.

That the only payments made upon any of said claims were made as follows: That all the payments or pretended payments made upon said judgments were made in the said "confederate currency" to the clerks of the respective courts wherein said judgments were rendered, and part of the same by said clerks deposited in banks in the respective places where they resided, and certificates of deposit received for the same, and the said certificates then turned over by said clerks to the def't, and the balance of said payments paid over to the def't by said clerks in said confederate currency by them received.

That said certificates of deposit and confederate currency were not converted to def't's use, or by him in any manner used whatsoever, but that he has retained the same, and still has the same subject to the order and direction of the pl'ff, or such person as legally represents the estate of the said Samuel Hill.

That on or about the month of July, 1865, def't tendered all of said currency and certificates by him so received to the pl'ff, and the pl'ff then and there refused to receive the same.

That all the money collected upon said notes, except as hereinafter admitted, was received in said confederate currency, and not at the solicitation of the def't, but on the offer of the said debtors, and that def't did not convert any of the same to his own use, but has retained the same said money for the use of said pl'ff, or such person as legally represents said estate, and made tender of the same to pl'ff at the same time as the tender above mentioned, and pl'ff refused to receive the same.

That ever since the said secession, or pretended secession of said State, the same, and particularly the regions where said def't
24 resided, and the counties where such judgments were rendered, were, and until after all the said judgments above mentioned were made continued, under the exclusive power and control of the government and armies of the so-called Confederate States.

That the def't discharged none of the judgments, and in no manner acknowledged the payment thereof, except in receiving the said certificates of deposit and confederate currency aforesaid. That at the time of his so receiving the same, the so-called Confederate States were at war with the United States Government, and engaged in a rebellion against the same.

That there was great excitement throughout the State of North Carolina consequent thereupon, and much feeling upon the subject of the validity of the said confederate currency. That such a state of circumstances arose on account of said rebellion, and continued until after all of said pretended payments. That the def't did not dare refuse to receive the said certificates of deposit and confederate currency when the same were offered to him, and would have been in great danger of bodily harm and loss of property had he so refused. That he had reasonable ground for such fear of evil consequences to himself in case of such refusal, and had such fear; and in receiving said certificates and currency was not a voluntary agent, but acted under the duress aforesaid, and that he would not have so received the same had it not been for said duress.

That, in exception to the above allegation, the def't admits the collection of money in other funds than the said confederate currency to an amount which, with interest thereon, would amount to the sum of
25 eighteen hundred and seventy-three dollars and thirty-three cents, ($1,873.33.)

That he, the defendant, was employed by the pl'ff as attorney to take charge of the matters mentioned in the complaint, and at the time therein stated; that he did attend to said matters in the best possible manner which the circumstances of the rebellion of the said State of North Carolina, and war therein as above mentioned, would permit; that his services as such attorney were reasonably worth the sum of one thousand dollars; that neither said sum nor any part thereof has ever been paid, and that he is justly entitled to retain one thousand dollars of the said $1,873.33 for and in consideration of said services.

Wherefore def't admits that he is indebted to the said estate of Samuel Hill in the sum of $873.33, but denies that he is indebted to said estate in any other manner or sum whatsoever.

And the def't denies each and every allegation in said complaint but herein specifically admitted.

WILSON & McNAIR,
Def't Atto's.

Verification of answer.

STATE OF MINNESOTA,
County of Hennepin, ss:

R. J. Mendenhall, being duly sworn, doth depose and say: That he is agent of the defendant in the action in the foregoing answer entitled, and that the said answer is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true, and that he makes this verification because the said defendant is absent from the county of Hennipin, Minn'a, where his attorneys reside.

R. J. MENDENHALL.

26 Subscribed and sworn to before me on this 30th day of January, A. D. 1869.

BUDD REEVE,
Notary Public, Minnesota.

(Copy of answer.)

Affidavit of service of copy of answer.

District court, 4th district.

STATE OF MINNESOTA,
County of Hennepin, ss:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased, *ag'st* CYRUS P. MENDENHALL.

George Bradley, being duly sworn, doth depose and say: That he is one of the law firm of Cornell & Bradley, pl'ff's att'ys, in the above-entitled action; that the copy of answer in said action, hereto annexed, was served on them, said attorneys, on February 1st, 1869, by the firm of Wilson and McNair, who had personally served on said pl'ff's said attorneys a notice of appearance which is hereto annexed; that as to whether said answer was served by said Wilson or said McNair in person, or by their clerk, deponent is unable to recollect, but that said notice of appearance was served by said Wilson, of the said firm of Wilson & McNair, personally on this deponent, and was by him, said Wilson, signed in deponent's presence; that notice of substitution of Lochren

& McNair for Wilson & McNair, hereto annexed, was afterwards
27 served upon said pl'ff's said attorneys by one Budd Reve, who is clerk in said Lochren & McNair's office, in pursuance of directions in that respect and to that effect given in deponent's presence and hearing by said McNair a few days previous.

That deponent has seen the original answer of which the annexed is a copy, and that the verification thereof is signed by R. J. Mendenhall, in his handwriting; that deponent is acquainted with said handwriting, and knows that signature to said original answer is genuine; and further deponent says, that said Lochren & McNair have failed and neglected to file said original answer, as required by law.

GEORGE BRADLEY.

Subscribed and sworn to before me this 6th day of April, 1870.

[L. S.] F. B. CORNELL,
Notary Public.

Reply of pl'ff.

District court, fourth district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, ADMINISTRATOR OF THE estate of Samuel Hill, deceased,
vs.
CYRUS P. MENDENHALL.

The plaintiff in the above-entitled action, replying to defendant's answer therein, denies that defendant attended to said pl'ff's said matters in the best manner which said circumstances would permit,
28 and alleges that said defendant*dant* did not act in said matters for said pl'ff in good faith, and denies that def't's alleged and pretended services were worth the sum of one thousand dollars, or any other sum whatevever, and denies that def't is entitled to retain said sum or any sum whatever out of the monies collected *collected* by him, in consideration of said pretended serservices.

Wherefore pl'ff asks judgment as in his complaint.

CORNELL & BRADLEY,
Pl'ff's Att'ys.

Verificatication of reply.

STATE OF MINNESOTA,
County of Hennepin, ss:

Nathan B. Hill, being duly affirmed, deposes and says: That he is plaintiff in the above-entitled action; that the foregoing reply therein is true of his own knowledge, except as to matters therein stated upon his information and belief, and as to those matters, he believes it to be true.

NATHAN B. HILL.

Subscribed and affirmed to before me this 16th day of February, A. D. 1869.

JOHN E. HALL,
Notary Public, Minn'a.

Reply. Service of within reply by copy thereof acknowledged, this 16th day of February, 1869.

WILSON & McNAIR.

29 *Notice of argum't.*

District court, 4th district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, ADM'R OF THE ESTATE OF Samuel Hill, dec'd, *ag't* CYRUS P. MENDENHALL. } Notice of argument.

SIR: You will please take notice that the issues of fact in the above-entitled action will be brought on for trial at the next general term of the court aforesaid, appointed to be held in and for the county of Hennepin, at the court-house in the city of Minneapolis, in said county, on the 4th day of May, 1869, at the opening of said court on that day, or as soon thereafter as counsel can be heard.

Dated April 26th, 1869.

Yours, respectfully,

CORNELL & BRADLEY,
Atto's for Pl'ff.

To WILSON & MCNAIR,
Attorneys for Def't.

Due service of with' notice is hereby admitted at , Minnesota, this 26th day of April, 1869.

WILSON & MCNAIR,
Attorneys for Defendant.

30 *Trial and judgment.*

Hennepin County, 4th judicial district.

STATE OF MINNESOTA,
District Court:

NATHAN B. HILL, ADMINISTRATOR OF THE ESTATE of Samuel Hill, deceased, *ag't* CYRUS P. MENDENHALL.

This cause being at issue upon the complaint of the plaintiff, the answer of the defendant, and the reply of the plaintiff thereto, and the same being regularly on the calendar of said court for trial, at the regular general term thereof, held in and for said county, on the first Tuesday of May, 1869, and the same having been called in its order upon the calendar, Cornell & Bradley, esq'r's, appeared for the plaintiff as his counsel and his attorneys, and Wilson and McNair, esq'r's, attorneys for the defendant, appeared as counsel and attorneys for him, said defendant, and duly waived a trial by jury in said cause, in open court, and by mutual agreement, duly entered in the minutes, stipulated then and there to try the said cause before the said judge without a jury. And the hearing and trial thereof having by consent been adjourned from time to time till the 5th day of March, 1870, the attorneys of said parties on that day appeared before the said judge at special term, at his chambers in said county, and by mutual agreement fixed the trial of said cause for the 12th day of March, 1870, which agreement was duly entered in the minutes.

That on the said 12th day of March, 1870, the said cause was duly called for trial before the judge of this court, at his said chambers, at the
31 opening of the court on that day, in pursuance of the agreement and stipulation aforesaid. The said plaintiff appeared by his said attorneys, and the said defendant's attorneys did not appear; and thereupon the court proceeded to hear the pleadings and allegations of the said parties, and to hear and take the proofs offered in said cause in support of the said plaintiff's cause of action. No proof or evidence being offered by the defendant, and the case having been submitted to the court upon the evidence of the plaintiff, and due consideration thereon had, it is found as matter of fact in this action, that Samuel Hill, mentioned in the complaint, died intestate as alleged in said complaint, and that the plaintiff, Nathan B. Hill, was duly appointed administrator of his estate, and letters of administration thereon duly issued to him therein, at the May term of the court of pleas & quarter sessions, 1859, as in said complaint alleged, and that an authenticated copy of the order of said court issuing said letters, and making the said appointment, was duly filed in the said probate court of Hennepin County, State of Minnesota, before the commencement of this action. That on the 5th day of August, 1861, the said plaintiff, as such administrator, placed in the hands and charge of said defendant, and delivered to him, the several claims and demands, notes, judgments, and choses in action, which are particularly described in the complaint herein, and the whole of the same, and the said defendant thereupon executed and delivered to the said plaintiff a receipt for the same, in which he acknowledged the receipt thereof, and expressly undertook therein to account to the said plaintiff for the same, by collection or otherwise. That the said demands and claims were all good and collectable to the full
32 amount thereof, as charged in the said complaint.

That thereafter, in the fall of 1866, the said plaintiff, by his duly authorized agent, applied to said defendant for a settlement on account of the said demands and securities so left with him as aforesaid, whereupon the said defendant admitted and acknowledged that he had collected all the same except one, about which he was uncertain, and which he could not find, but which he acknowledged himself accountable for; but the said defendant then and there neglected and refused, and ever since has so done, to pay over to said plaintiff, or on his account, any money on account of said securities, or to deliver or return the said plaintiff any of the same. And the plaintiff has received nothing on account of the same from any source.

That the amount of the said claims and demands up to the time of the commencement of this action, with the interest, was the sum of twenty-four thousand six hundred and twenty-six dollars and five cents, as stated in said complaint.

As conclusions of law, I find that the said defendant has converted the said demands and choses in action to his own use, and is liable to pay the plaintiff the amount of the same with interest thereon to this date, amounting in all to the sum of twenty-seven thousand two hundred and thirty $\frac{94}{100}$ dollars, for which amount judgment is ordered for the said plaintiff against the said defendant.

Dated March 25th, 1870.

By the court.

CHA'S E. VANDERBURGH, *Judge.*

Decision. Filed April 6th, 1870.

D. W. ALBAUGH, *Clerk.*

33 *Bill of costs.*

District court, 4th district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased,
vs.
CYRUS P. MENDENHALL.
} Bill of costs.

Fee allowed by statute	$10 00
12 affidavits & acknowledgments	3 00
One witness, A. H. Lindly, and one day & mile's travel	1 12
Publication of summons	6 23
Sheriff's fees:	
For making return on summons	1 00
Serving writ of attachment	1 20
" garnishee process on bank	1 10
Referee, one day taking testimony in attachment	5 00
Fees & mileage paid 3 garnishees	3 36
Clerk's fees	8 60
	$40 63

Bill of costs taxed this 13th day of April, A. D. 1870, at $40.63.
D. W. ALBAUGH, *Clerk.*

Verification of bill of costs.

HENNEPIN COUNTY, *ss:*

George Bradley, being duly sworn, says: That he is one of pl'ffs attorneys in above-entitled action; that all the items charged in the
34 foregoing bill of costs are correct, and were each and all necessarily paid or incurred in said action.

GEORGE BRADLEY.

Subscribed and sworn to before me this 11th day of April, 1870.
[L. S.] F. B. CORNELL,
Notary Public.

Notice of taxation of costs.

GENTLEMEN: Take notice that on Wednesday, the 13th day of April inst., at 8½ o'clock a. m., we will apply to the clerk of said court for the taxation of the foregoing bill of costs, and to insert the same in the judgment in above-entitled action.

Respectfully,

CORNELL & BRADLEY,
Pl'ffs Att'ys.

To LOCHREN & MCNAIR,
Def'ts Att'ys.

Service of notice.

STATE OF MINNESOTA,
County of Hennepin, ss:

George Bradley, being duly sworn, doth depose and say, that he served the foregoing notice for the taxation of costs in above-entitled action up-

on Messrs. Lochren & McNair, att'ys for def't, by giving him in hand and leaving with William Lochren, one of said attorneys, at their office in said county, a true copy thereof, on Monday, the 11th day of April, 1870.

GEO. BRADLEY.

Subscribed & sworn to before me this 13th day of April, 1870.
[L. S.] D. W. ALBAUGH, *Clerk.*

35 *Judgment-roll.*

District court, 4th district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, ADMINISTRATOR OF THE estate of Samuel Hill, deceased,
against
CYRUS P. MENDENHALL.

This cause having been duly brought to an issue and regularly placed on the calendar of said court for trial at a general term thereof, began and holden at Minneapolis, in said county of Hennepin and State of Minnesota, on the first Tuesday in May, 1869, said plaintiff appeared by Cornell & Bradley, his attorneys, and said defendant by his attorneys, Mess'e'rs Wilson & McNair, and in open court, by mutual agreement duly entered on the minutes of said court, stipulated then and there to try said cause before the court without a jury; and the hearing and trial thereof was by consent adjourned from time to time, till the fifth day of March, A. D. 1870; and the said attorneys of said parties on that day appeared at a special term of said court, and by mutual agreement fixed the trial of said cause for the twelfth day of March, 1870, which agreement was duly entered on the minutes of said court.

And on said twelfth day of March, 1870, said cause was duly brought on for hearing and trial, and pl'ff's attorneys appeared, and def't's attorneys did not appear; and the proofs and allegations of said plaintiff having deen duly submitted, and the decision of said court thereon duly rendered in favor of said pl'ff, and against said defendant, for the sum
36 of twenty-seven thousand two hundred and thirty dollars and ninety-four cents, debt:

Now, therefore, on motion of Mess'e'rs Cornell & Bradley, attorneys for said plaintiff, it is hereby adjudged that plaintiff recover of said defendant the sum of twenty-seven thousand two hundred and thirty dollars and ninety-four cents, debt, or damages, ($27,230.94,) and forty dollars and sixty-three cents, ($40.63,) costs of suit; in all, the sum of twenty-seven thousand two hundred and seventy-one dollars and fifty-seven cents, ($27,271.57).

D. W. ALBAUGH,
Clerk District Court.

Amount damages $27,230 94
Costs & disbursements 40 63

Judgment-roll. Filed April 13th, 1870, at 10 o'clock a. m.
D. W. ALBA

Verification of record.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin:

NATHAN B. HILL, AS ADMINISTRATOR OF THE estate of Samuel Hill, deceased,
against
CYRUS P. MENDENHALL.

I, Daniel W. Albaugh, clerk of the fourth judicial district court in and for Hennepin County and State of Minnesota, do hereby cer-
37 tify that the paper-writing to which this certificate is attached was by me compared, and is a true and correct copy of the summons, complaint, affidavit of non-residence, summons as published, affidavit of publication, notice of appearance, notice of substitution of attorneys, answer of defendant, affidavit to copy of answer, reply of plaintiff, notice for argument, decision and order of court, bill of costs, affidavit of service, of notice for taxation of costs, statement of judgment, and copy of docket-entry, as the same appears of record and on file in said clerk's office at Minneapolis, Hennepin County, State of Minnesota; and the same compose the judgment-roll in the above-entitled action, and all the papers in the case.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court this 14th day of April, A. D. 1870.

[L. S.]
[Stamp—5 cts.]

D. W. ALBAUGH, *Clerk.*

Transcript of docket entries.

STATE OF MINNESOTA.

Judgment debtor.	Judgment creditor.	Date of Judgment.	Date of docket.	Amount of judgment.	Register, No.	Remarks.
Mendenhall, Cyrus P.	Nathan B. Hill, as administrator of the estate of Samuel Hill, deceased.	April 13th, 1870.	April 13th, 1870, 10 o'clock a. m.	$27,271.57	3094.	Cornell & Bradley, attorneys for pl'ff.

STATE OF MINNESOTA,
District Court, Fourth Judicial District, Hennepin County:

38 I, Daniel W. Albaugh, clerk of said court, do hereby certify that the foregoing is a true transcript of the docket-entry made in this court in a cause between Nathan B. Hill, as administrator of the estate of Samuel Hill, deceased, plaintiff, and Cyrus P. Mendenhall, defendant, as appears from the records in my office.

In testimony whereof I have hereunto set my hand an' official seal, at Minneapolis, this 14th day of April, A. D. 1870.

[L. S.]

D. W. ALBAUGH,
Clerk District Court.

Certificate of judge.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin:

I, Charles E. Vanderburgh, judge of the district court fourth judicial district of the State of Minnesota, in which district the said county of Hennepin is included, do hereby certify that D. W. Albaugh, whose name is attached to the above and foregoing certificate of attestation, was at the date thereof the clerk of said court in and for said county of Hennepin, duly qualified and acting as such, and that full faith and credit should be given to all his official acts; that said record and the above attestation thereof by said clerk are in due form, and that the signature of said clerk thereto is genuine.

[L. S.] CHA'S E. VANDERBURGH,
Judge of District Court Fourth Judicial District.

Dated at Minneapolis, Minn., April 14th, A. D. 1870.

39 The plaintiff, the said Nathan B. Hill, administrator as aforesaid, afterwards, to wit, on the 23d day of March, A. D. 1872, files in this the office of said circuit court a bond, with E. E. Mendenhall and R. N. Caldwell as sureties, in the sum of three hundred dollars, for the prosecution of this writ of error, which is adjudged sufficient, and herewith sent.

Copy of writ of error filed in office for defendant. Issued.

40 *Bond for the prosecution of writ of error.*

Supreme Court of the United States.

NATHAN B. HILL, AS ADMINISTRATOR OF SAMUEL Hill, deceased,
vs.
CYRUS P. MENDENHALL. } In error.

Know all men by these presents, that we, Nathan B. Hill, principal, and E. E. Mendenhall & R. N. Coldwell, sureties, are held & firmly bound to Cyrus P. Mendenhall in the sum of three hundred dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executores, and administraters, jointly and severally by these presents, sealed with our seals, and dated this 13th day of March, 1872.

Whereas the above-named Nathan B. Hill, as administrator of Samuel Hill, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above-entitled suit in the circuit court of the United States for the district of North Carolina;

Now, therefore, the condition of this obligation is such, that if
41 the above-named Nathan B. Hill, as administrator as aforesaid, shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea in that behalf, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

Witness:

N. B. HILL. [SEAL.]
By his Attorney E. E. E. E. *Mendenhall.*
E. E. MENDENHALL. [SEAL.]
R. N. CALDWELL. [SEAL.]

(Indorsed:) Nathan B. Hill, adm'r of Samuel Hill, dec'd, *vs.* Cyrus P. Mendenhall. Appeal bond. Filed Mar. 23rd, 1872. N. J. Riddick, clerk.

42 *Verification of the record.*

United States circuit court, eastern district of North Carolina.

I, N. J. Riddick, clerk of the said court, do hereby certify that the foregoing contains a full, true, and perfect transcript of the record in the case lately pending in said court between Nathan B. Hill, administrator of the estate of Samuel Hill, deceased, plaintiff, and Cyrus P. Mendenhall, defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of Raleigh, this 21st day of December, A. D. 1872.

[SEAL.]

N. J. RIDDICK,
Clerk U. S. Circuit Court, Eastern District N. C.
By QUENT. BUSBEE,
Dep. Clk.

Writ of error. Transcript of record, &c. $21.30.

(Indorsement on cover:) No. 408. Nathan B. Hill, as adm'r of Samuel B. Hill, deceased, plaintiff in error, vs. Cyrus P. Mendenhall. E. North Carolina, C. C. U. S. Filed 17th February, 1873.

In the Supreme Court of the United States,

NO. 408.

NATHAN B. HILL, *as Administrator of Sam'l Hill, dec'd*, Plaintiff in Error,
vs.
CYRUS P. MENDENHALL.

BRIEF OF PLAINTIFF IN ERROR.

W. A. GRAHAM,
Attorney and Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

NATHAN B. HILL, *as Administrator of Sam'l Hill, dec'd*, Plaintiff in Error,
vs.
CYRUS P. MENDENHALL.
} No. 408.

The Plaintiff in error submits as follows:

I. The Pleadings in this case are according to the forms of the Common Law.

The suit is an action of debt on a judgment, in a State Court of Minnesota, in which the proceedings were conducted in conformity with the Code of Civil Procedure originating in New York, and then obtaining in Minnesota. The only plea to the declaration is the general issue of *nul tiel record*, to which there is a general replication, and prayer for an inspection of the record.

II. The error assigned is, that the Circuit Court has adjudged that the judgment which is the subject of this action, is without effect, save within the limits of the State of Minnesota, and that the Defendant recover of the Plaintiff his costs; whereas the Plaintiff contends that the same is a valid judgment enforceable in this suit.

III. 1. The exemplification of the record from the Court in Minnesota proves clearly that there is such a record of judgment as that alleged. Rec. p. 6 to 17, and there is no issue on any other question.

The Plea merely puts in issue the existence of the record. 1 Chitty's Pl. 485; 2 do. 995, n.; 1 Wms' Saun. 92, n. 3; Phil. Ev., 254, n.; Mills *vs.* Duryee, 7 Cranch, 284; and the bill of exceptions, Rec. 5, shows that the Court below did in fact find and adjudge "that there is a record of a judgment * * " * as is alleged in the Plaintiff's declaration." And it is insisted that this finding is conclusive in favor of the Plaintiff

according to the pleadings, and that judgment should, therefore, have been rendered in his favor for the amount of said judgment.

2. If the defendant designed to contend that the judgment sued on had no effect beyond the limits of Minnesota, for want of personal service of process, or notice to him, he should have set up this defence by plea: to the end that the Plaintiff might join issue or demur. Lincoln *vs.* Tower, 2 McLean, 473; Westervelt *vs.* Lewis, Ib., 411; Christmas *vs.* Russell, 5 Wal., 290. And on any such issue the Plaintiff was entitled to a trial by jury.

3. But the exemplification shows that in the action in Minnesota the Defendant was represented by his Attorneys, for fourteen months; and, that they served notice on the Plaintiff's Attorneys, of retainer, Rec. 10, also a copy of his answer in strict compliance with the statute of the State, 11 to 13; and waived a trial by jury, &c., 15; and in such case the judgment is not void, but at most voidable by *audita querela* petition or motion. Landes *vs.* Brant, 18 Cur., 420.

4. But if the want of personal service, or due notice of the action, be considered as in issue by the Pleadings, it appears, that there was due notice, and a waiver of personal service by a voluntary appearance on the part of the Defendant by Attorneys.

(a). "A voluntary appearance of a defendant is equivalent "to personal service of summons upon him." Rev. Stat. of Minnesota, p. 457, sec. 54.

(b). "A defendant appears in an action when he answers, "demurs, or gives the plaintiff written notice of his appear-"ance. Ibid, 458, sec. 57.

(c). "The verification of a pleading may also be made by "the Agent or Attorney, if the party making such pleading is "absent from the county where the Attorney resides, or from "some cause is unable to verify the same." Ibid, 461, sec. 87.

The exemplification shows that there was an appearance, by notice, and by "answering," on the oath of a person deposing that he was "the agent of the defendant in the action."

This, it is insisted is equivalent to a return by a sheriff of service of process on his oath, and such return is incapable of contradiction, collaterally, at least. Thompson *vs.* Emert, 4 McLean, 96.

5. Service of notice of an appearance and retainer, generally, by an Attorney for the defendant shall, in all cases, be deemed an appearance; and after service thereof, the Plaintiff may have the Defendant's appearance entered. N. Y. Code as it is, p. 198, Rule 11; Statutes of Minnesota, Revision of 1866, page 457, sec. 51, page 458, sec. 57.

6. An Attorney who appears is presumed to have authority. Wait's An. Code N. Y., pp. 112-'13; Ibid, 778; Murray *vs.* Vanderbilt, 39 Bar., 141; Shelton *vs.* Tiffen, 16 Cur., 646; Fordyce *vs.* March, Am. Law Journal, Nov. 1872. There is sufficient protection against collusion by Attorneys in falsely representing parties, in their liability to summary and exemplary punishment for such malpractice.

7. The Defendant appeared not only by Attorneys, but by an Agent; and that agent a brother, supporting his authority by an oath, which, if false, exposed him to all the penalties of perjury. It is submitted that it is trifling with justice to allow impeachment of such a proceeding collaterally.

8. The parol evidence was perhaps irregularly admitted, except so far as to identify the Defendant and R. J. Mendenhall, and to show their relations; nor does it appear what was the finding of facts by the Court, upon that evidence. But it is insisted if those facts were open to contestation, that it is abundantly manifest that the appearance in the case was by the Defendant's order; that he had interviews with said R. J. Mendenhall in North Carolina pending the action in Minnesota; that the latter had opportunity to arrive at home just in time to give the notice shown in the record, and file the answer—an answer of which the material could have been furnished by no one but the defendant from his personal knowledge; and which, after insisting on every defence supposed to be maintainable, and claiming a fee of $1,000 for the defend-

ant's services in the matter which was the subject of the action admitted a balance due of $873.33.

The Plaintiff in error prays that the judgment of the Court below be reversed, and that judgment be entered in his favor for the amount specified in the record from Minnesota, with lawful interest thereon.

W. A. GRAHAM,
Atto. and Counsel.

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